1977

David Bowen v. Ruth Olsen : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID BOWEN,

Plaintiff-Appellant,

vs.

RUTH OLSEN,

Defendant-Respondent.

Case No. 15,137

BRIEF OF APPELLANT

Appeal from the Judgment of the District Court of the Fourth Judicial District in and for Utah County, State of Utah, the Honorable J. Robert Bullock, Judge.

JERIL B. WILSON
STOTT, YOUNG AND WILSON
84 East 100 South
Provo, UT 84601

Attorney for Appellant

JACKSON HOWARD
HOWARD, LEWIS AND PETERSEN
120 East 300 North
Provo, UT 84601

Attorney for Respondent

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	7
POINT I: UNDER THE LIMITED AUTHORITY GIVEN TO RONALD GARDNER, IT IS CONTRARY TO THE LAW TO FIND THAT HE HAD AUTHORITY TO WAIVE THE OPTION	7
POINT II: THE TRIAL COURT'S READING OF THE EARNEST MONEY AS ENTIRELY ABROGATED OR MERGED INTO THE SUBSEQUENT DEED AND AGREEMENT WAS CONTRARY TO THE FACTS AND THE LAW	14
POINT III: PLAINTIFF IS ENTITLED TO SPECIFIC PERFORMANCE	20
CONCLUSION	21

AUTHORITIES CITED

12 Am Jur 2d, Brokers, §30, p. 795	8
12 Am Jur 2d, Brokers, §66, p. 821	8
3 Am Jur 2d, Agency, §72, p. 474	9
3 Am Jur 2d, Agency, §73, p. 475	10
3 Am Jur 2d, Agency, §74, p. 477	10
3 Am Jur 2d, Agency, §75, p. 477	10
3 Am Jur 2d, Agency, §78, p. 482	12
3 Am Jur 2d, Agency, §77, p. 481	12

12 Am Jur 2d, Brokers, §65-66, pp. 819-821 12

3 Am Jur 2d, Agency, §78, p. 482-483 13

12 Am Jur 2d, Brokers, §71, pp. 824-826 13

43 ALR 2d 1014 at 1015 13

77 Am Jur 2d, Vendor and Purchaser, §28, pp. 204-206 16

17 Am Jur 2d, Contracts, §271, p. 679 ..... 16, 17

77 Am Jur 2d, Vendor and Purchaser, §60, p.245 17

17 Am Jur 2d, Contracts, §483, p. 952 18

77 Am Jur 2d, Vendor and Purchaser, §290 et. seq. 18

77 Am Jur 2d, Vendor and Purchaser, §291, p. 450 19

38 ALR 2d 1310 at 1320, §6 19

CASES CITED

Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970) 8, 20

B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972) 10, 11

Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (1975) 10, 11

Malia v. Giles, 100 Utah 562, 114 P.2d 208 (1941) 10, 11

Santi v. Denver & R.G.W.R. Co., 21 Utah 2d 157, 442 P.2d 921 (1968) 11

Equitable v. Nielsen, 30 Utah 2d 433, 519 P.2d 243 (1974) 12

Dohrmann Hotel Supply Co. v. Beau Brummell, Inc., 99 Utah 188, 103 P.2d 650 (1940) 12

Frandsen v. Gerstner, 26 Utah 2d 180, 487 P.2d 697 (1971) 13

Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221 (1953) 14

Lake v. Hermes Associates, 552 P.2d 126 (1976) 14

Holland v. Brown, 15 Utah 2d 422, 394 P.2d 77 (1964) 16

Kelsey v. Hansen, 18 Utah 2d 226, 419 P.2d 198 (1966) 18

Knight v. Southern Pacific Co., 52 Utah 42, 172 P.2d 689 (1918) 18

McCraw v. Richardson, 459 P.2d 620 (Oklahoma 1969) 19

Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971) 20

Nance v. Schoonover, 521 P.2d 896 (1974) 20

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID BOWEN,

Plaintiff-Appellant,

vs.

RUTH OLSEN,

Defendant-Respondent.

Case No. 15,137

BRIEF OF APPELLANT

NATURE OF THE CASE

This is a suit by a prospective buyer of real estate to compel specific performance of an option contract which is part of an executed earnest money agreement for the sale of real property.

DISPOSITION IN THE LOWER COURT

On March 17, 1977, the District Court of the Fourth Judicial District, Judge J. Robert Bullock presiding, after a trial on the issues by the court, ruled that the plaintiff was not entitled to a decree of specific performance on the basis that plaintiff had failed to prove a cause of action.

Defendant's counterclaim was also dismissed on the basis of failure to prove a cause of action. Only the judgment against plaintiff is being appealed.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the trial court's findings and judgment.

STATEMENT OF FACTS

For simplicity in reference, the titles "plaintiff" and "defendant" will be used herein.

In October 1975, the plaintiff asked Ronald Gardner, hereinafter "Gardner", a licensed real estate agent, to assist him in finding some property for the plaintiff to use as a bicycle shop. Gardner contacted Lee Bamgartner, a licensed real estate agent with whom defendant had listed the property which is the subject of this lawsuit, and which is referred to in the record as parcel "A", and which had frontage on Second West Street, in Provo, Utah. Immediately to the east of parcel "A" is a smaller piece of property described in the record as parcel "B". Both parcels "A" and "B" were a small part of defendant's property which was listed for sale with Mr. Bamgartner.

Plaintiff was desirous of purchasing the frontage property, parcel "A", but Gardner was told by Lee Bamgartner that said parcel was not available because another party had already made an offer on it (R. 17). On November 4, 1975, plaintiff had Gardner present an offer to buy parcel "B" (Exhibit P-17, R 17), and gave Gardner $1,000.00 to hold as earnest money (R. 100). That offer was refused. Plaintiff then had Gardner present a second offer to purchase parcel "B" on December 22, 1975 (Exhibit D-5, R. 17, 18). The earnest money agreement had not yet been signed by either party, but there was a tentative assent by defendant to sell parcel "B" to the plaintiff at that time. On January 7, 1976, Gardner took the December 22 earnest money agreement back to plaintiff for his signature. (R. 27). At that time, plaintiff expressed a desire to acquire more property from the defendant and instructed Gardner to add to the earnest money an option to buy other land to the east of parcel "B" and an option to buy parcel "A", which is west of parcel "B". The option for property to the east of parcel "A" was never exercised and has no significance in the lawsuit. The next day, January 8, 1976, Gardner wrote the options into the earnest money agreement, but only after defendant and Lee Bamgartner insisted that a stipulation giving defendant ingress and egress be put in at the

same time. After the options and the ingress-egress stipulation were written in, the defendant signed the earnest money (Exhibit D-6, R. 20, 23, 27-28, 44, 57-58, 71, 101).

The closing on parcel "B" was set for February 29, 1976, (Line 15, Exhibit D-6) and the option on the land east of parcel "B" was to be good for six months from the time title was clear (Lines 49-50, Exhibit D-6). The option on parcel "A" was understood to be a "back-up option" to the previously mentioned offer by defendant to sell to another and was to be on the same terms as the prior offer. It was to be good for 90 days from the time notice of release of the first offer was given to plaintiff (Lines 50-57, Exhibit D-6). Plaintiff knew the general terms of the prior offer on parcel "A" (R. 95, 101-102), although there was some confusion about the identity of the party making the first offer. The prior offer had been made by one Larry Walters, but at times both parties were under the impression that Walters was acting for "Iron Horse", a corporation (R. 21, 98, 113, 143-144). Later on the plaintiff and Gardner were also told by Lee Bamgartner that a Mr. Castle was also part of the "Iron Horse" arrangement (R. 34). Castle and Walters were working on developing the land together, and Walters had authorized Castle to act as his agent (R. 115-116). The question of what parties were working together

becomes important later on because of the issue of notice to plaintiff that the previous option on parcel "A" had been given up.

Despite the confusion as to the identity of the prior offeror, there is no doubt that all parties were talking about the same parcel "A" (R. 60-64).

By its terms, the prior offer made by Larry Walters was to expire on December 31, 1975, (R. 37, 108, Exhibits D-3, D-4) but the closing date had been set for February 13, 1976 (R. 85). Walters, however, on the date of the closing, notified the defendant that he would not be able to close on parcel "A" because he was unable to get the necessary financial backing. However, Walters received an extension of the earnest money agreement to April 7, 1976, at which time that offer was changed to other property which Walters subsequently purchased. This extension was granted by reason of Walter's paying $4,500.00 to Lee Bamgartner on March 29, 1976 (R. 109, 112, Exhibit 19).

On or about February 17, 1976, Castle made an offer to defendant which was for a substantially higher price than the option held by plaintiff (R. 78-79). While plaintiff knew that Castle had been dealing with defendant, he had been given to understand that Castle was part of the "Iron Horse" arrangement (R. 98); and as previously mentioned,

he believed that Castle was the agent of Walters (R. 115-116).

On March 11, 1976, plaintiff bought an additional twenty feet of land from defendant (Exhibit D-6, R. 29, 79).

On April 7, Castle came to an agreement with defendant regarding parcel "A"; and on April 9, Walters came to an agreement with defendant as to the property to the north (R. 80).

There is no evidence of plaintiff ever personally receiving notice that the prior agreement with Walters or "Iron Horse" as to parcel "A" had ever been terminated. Plaintiff indirectly received the information that Walters was buying the land north of parcel "A" and not parcel "A" itself on about May 20 from Walters (R. 99).

There was conflicting evidence about whether Gardner had ever been directly informed that the "Iron Horse" offer had been released (R. 42-43, 46, 76-78, 84).

After the April 20 closing on parcel "B", at which time the ingress and egress across parcel "B" was prepared, plaintiff learned of the separate agreement of defendant with Castle (R. 24, 25).

On May 25, 1976, a letter was sent by plaintiff to defendant giving notice of plaintiff's desire to exercise the option.

While Gardner did present various offers and proposals to defendant and others, Gardner was acting at all times under the supervision of the plaintiff. Gardner never did anything without the express permission and direction of plaintiff (R. 25, 27, 105, 106). Plaintiff personally appeared for his part of all closing (R. 31, 32, 66) and signed all documents himself (R. 25, 31, 32, 53, 54, 95, 101).

ARGUMENT

POINT ONE

UNDER THE LIMITED AUTHORITY GIVEN TO RONALD GARDNER, IT IS CONTRARY TO THE LAW TO FIND THAT HE HAD AUTHORITY TO WAIVE THE OPTION

The trial court found that Gardner was plaintiff's agent for all purposes in the transactions between plaintiff and defendant (Findings of Fact 6). Plaintiff contends that Gardner had only limited authority to present offers and that Gardner always acted under plaintiff's direction. Plaintiff, therefore, contends that the trial judge erred in finding that Gardner had such broad powers. Such a broad holding is not supported by the evidence presented at trial and is contrary to the law regarding real estate agents and realtors.

In a suit in equity such as this one for specific performance, the Supreme Court reviews both questions of fact and law. While this is done in the light most favorable to the party prevailing at trial, the trial court's judgment must at least be supported by a preponderance of the evidence. Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970). Plaintiff contends that Gardner had no implied or apparent authority to waive the option. It is uncontested that Gardner was never given any express authority to waive plaintiff's option on parcel "A".

The real estate broker-client relationship is one of agency, and the law of agency governs that relationship throughout. 12 Am Jur 2d, Brokers, §30, p. 795. Real estate brokers are special agents with limited powers. 12 Am Jur 2d, Brokers, §66, p. 821 provides:

> A real estate broker is, generally speaking, a special agent with limited powers and is, therefore, in dealing with land, closely restricted within the terms of his agency. His authority is only such as is specifically conferred, either expressly or by necessary implication. He must keep within the bounds of the authority conferred upon him, otherwise the principal will not be bound. Persons dealing with him are chargeable with notice of limitation of his power and put upon inquiry to ascertain the extent of his authority.
>
> In determining the extent of his authority, his contract will be strictly construed, and any doubts will be resolved against him.

Because their powers are limited, they are better described as realtors rather than agents.

Business usage and customs are also considered in evaluating the extend of an agent's implied authority. 3 Am Jur 2d, Agency, §72, p. 474. Gardner was not authorized to do anything without the express authority of the plaintiff (R. 25,105, 106). Gardner was empowered by both the earnest money agreement and plaintiff's oral instructions to present several different offers to the defendant and Castle. Gardner was asked by plaintiff to help advise the plaintiff in qualifying with the city planners. Gardner took care of the details in preparation for the closing, and both Gardner and Lee Bamgartner were present at the real estate closing on parcel "B". Together they prepared the papers for parcel "B" even though the plaintiff and defendant appeared separately for their respective parts of the transaction. All of these activities constitute the normal and expected conduct of realtors with limited powers, because they are details collaterally related to the agent's authority. It is also common knowledge that a realtor's authority does not extend to making binding decisions for his client without express authority. Gardner, therefore, had no impled authority to waive the option.

Because there was not express or implied authority to waive the option, the trial court's finding of a waiver can only be based on the theory of apparent authority. Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing. 3 Am Jur 2d, Agency, §73, p. 475. A principal may also clothe an agent with apparent authority by negligently failing to disapprove of the agent's acts which cause the public to believe the agent has authority. 3 Am Jur 2d Agency, §74, p. 477. In the case at bar, there is no evidence that plaintiff negligently failed to disapprove of Gardner's acts. Plaintiff was never made aware of the alleged waiver and promptly sought to exercise his option when notified of the prior option failing.

For an agent's acts to be binding on his principal, there must have been (1) consent or knowing permission of the agent's acts by the principal; (2) knowledge by the third party of the principal's acts of consent; and (3) reliance by the third party to his detriment on that fact. 3 Am Jur 2d, Agency, §75 p. 477; B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972); Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (1975); Malia v. Giles, 100 Utah 562, 114 P.2d 208 (1941).

There was no evidence offered to show that Gardner had such broad authority except what other claims Gardner himself said regarding a waiver, which statement is disputed by Gardner (R. 42, 43, 46, 76-78, 84).

There is no dispute, however, over the fact that plaintiff had never given Gardner any authority by either signing for or releasing the plaintiff's rights in parcel "A" (R. 105, 106). Proof of an agent's authority must come from acts by his principal and not from the agent's own representations or activities. Santi v. Denver & R.G. W.R. Co., 21 Utah 2d 157, 442 P.2d 921 (1968); B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972); Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (1975); Malia v. Giles, 100 Utah 562, 114 P.2d 208 (1941).

Because there was no act by plaintiff which could be construed as giving Gardner apparent authority to waive the option, any findings based on apparent authority must fail because there is not evidence of the first necessary element, an act by the principal which gives the apparent authority. The very essence of this case is that, even assuming Gardner did orally waive the option, any waiver was clearly beyond the scope of his authority, was unauthorized and unknown by the plaintiff, and, therefore, not

binding on the plaintiff. This court, in one of the few cases dealing with the issue of a realtor's oral waiver of option rights said that the rights of a seller on an option contract cannot be orally waived by a realtor unless specifically authorized to do so. Equitable v. Nielsen, 30 Utah 2d 433, 519 P.2d 243 (1974). The Equitable case dealt with a realtor's waiver of a seller's rights while this case deals with a realtor's waiver of a buyer's rights. Equitable was a suit by a realtor for a commission, but the basic principal is the same. A realtor's unauthorized oral waiver of option rights is not binding on the party the realtor sought to bind. An agent's improper assumption of authority is not binding on his principal. 3 Am Jur 2d, Agency, §78, P. 482.

The defendant was also chargeable with knowledge of Gardner's limited authority as a realtor and had the duty to ascertain his authority to waive any option agreement. A principal is not bound if his agent is exceeding his authority, and the third party knew or should have known of the improper act through reasonable diligence. 3 Am Jur 2d Agency, §77, p. 481; 12 Am Jur 2d, Brokers §65-66, pp. 819-821; Dohrmann Hotel Supply Co. v. Beau Brummell, Inc., 99 Utah 188, 103 P.2d 650 (1940). Because of defendant's own failure to ascertain Gardner's limited authority, she

cannot be allowed to prevail by claiming that she relied to her detriment on her own falure to ascertain the authority of those with whom she was dealing. A principal is allowed to assume that third parties dealing with his agent will not be negligent in failing to ascertain the limits of the agent's authority. 3 Am Jur 2d, Agency, §78, p. 482-483.

Because plaintiff had a firm contract right represented by the option, his position is analogous to that of a person being desirous of selling his land. Where the seller engages the services of a realtor, giving him authority only to locate a buyer who is ready, willing and able to purchase the land under a standard broker's listing, the law is clear that the realtor cannot bind the seller to give up his own land if the realtor signs a contract for sale himself. The realtor's only authority is to bring the parties together, absent specific authority to the contrary. 12 Am Jur 2d, Brokers, §71, pp. 824-826, 43 ALR 2d 1014 at 1015; Frandsen v. Gerstner, 26 Utah 2d 180, 487 P.2d 697 (1971). Likewise, plaintiff should not be forced to surrender his option rights because his realtor erroneously waives the option without authority.

For the foregoing reasons, the plaintiff contends that the evidence was insufficient as a matter of law to

support the conclusion that Gardner had express, implied or apparent authority from plaintiff to waive the option.

POINT TWO

THE TRIAL COURT'S READING OF THE EARNEST MONEY AS ENTIRELY ABROGATED OR MERGED INTO THE SUBSEQUENT DEED AND AGREEMENT WAS CONTRARY TO THE FACTS AND THE LAW

The trial court found that by the express terms of the earnest money receipt and "option" to purchase, the option on parcel "A" contained therein was abrogated at the time of the final contract.

Plaintiff contends that the trial court's interpretation of the earnest money failed to take into account all of the terms of the earnest money and that the court is, therefore, factually in error.

A trial court's interpretation of a written document is not binding on appeal; and this court may, therefore, interpret the earnest money agreement anew, as long as extrinsic evidence is not needed to interpret it because of ambiguities. Ephraim Theatre Co. v. Hawk, 7 Utah 2d 161, 321 P.2d 221 (1953); Lake v. Hermes Associates, 552 P.2d 126 (1976). The trial court looked at the express terms of the agreement only and found them unambiguous as to the

issue of abrogation. This court, therefore, may interpret the earnest money agreement anew. Line 39 through 41 of the earnest money agreement provide the following, which is part of the printed form:

> It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the Seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. If is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase. (Emphasis added)

The trial court based is findings of abrogation on this language and the subsequent papers prepared at the closing of parcel "B" but failed to consider two other very important facts apparent on the face of the earnest money agreement and subsequent papers on parcel "B". These are the following: (1) The earnest money itself provides on line 25 for a closing on February 29, 1976, but for the option on property to the east of parcel "B" and the option on parcel "A" to be good for six months (line 49) and 90 days after notice of release of a prior offer (line 54) respectively. These time periods clearly show an intent for the options to survive the closing, which was set for less than 60 days after the agreement was accepted and only 79 days from the date the earnest money was filled out; (2) The

earnest money form, although printed in the singular tense, was really being used to evidence three separate agreements, a contract for sale on parcel "B" and options on parcel "A" and additional property east of parcel "B". It is a common procedure in the real estate business to use one form such as this for several lots or parcels which are in close proximity to each other or otherwise related. A contract for the sale of real estate and an option contract are different contracts with different obligations, and each must be treated separately. 77 Am Jur 2d, Vendor and Purchaser, §28, pp. 205-206.

Because of these additional facts, the only way to give a proper constuction to all of the terms of the earnest money agreement is to rule that each separate agreement will be abrogated when the final contract as to that parcel is executed. This seems to be the only reasonable construction under the rules of construction.

> The rule is well settled that where part of a contract is written or typed and part is printed, and the written or typed and the printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing or typing will control.

17 Am Jur 2d Contracts, § 271 p. 679; Holland v. Brown, 15 Utah 2d 422, 394 P.2d 77 (1964).

Where the written or typed and printed parts may be reconciled by any reasonable construction, as by regarding

one as a qualification of the other, that construction must be given, because it cannot be assumed that the parties intended to insert ineffective provisions. 17 Am Jur 2d Contracts, §271, p. 679. 77 Am Jur 2d, Vendor and Purchaser, §60, p. 245.

Under these rules, the only possible conclusion can be that the two options on the separate parcels of ground were not destroyed by the execution of a final contract for the third parcel which was parcel "B" and that the trial court's construction should, therefore, be reversed, even if the words are construed against plaintiff, who was the party responsible for the choice of words used.

The parties could have later intended to abrogate or otherwise surrender the options at the closing on parcel "B", but the evidence is that parcel "A" was not discussed at the time of closing parcel "B". Plaintiff also contends that the trial court erred in applying the law to this closing on parcel "B" by ruling that the option on parcel "A" was abrogated or otherwise excluded by the closing on parcel "B".

Abrogation is defined in Black's Law Dictionary as an act of annulment, repeal, destruction, or subrogation of authority. Abrogation is basically another name for the doctrine of merger, which is that all prior negotiations

and understandings on the same subject as a written contra... are extinguished if not expressly incorporated into the wri... ten document, and that after a valid substituted agreement ... executed, a prior written agreement is extinguished. 17 Am Jur 2d, Contracts, §483, p. 952. However, a key requirement is that the subsequent agreement must deal with the same subject matter to extinguish the prior agreement. 17 Am Jur 2d, Contracts, §483, p. 952.

In the case at bar, the parties were dealing with three different parcels with different options on two and a sales contact on one. Just as exercise of one of the options would not abrogate the other option or sales contract so the closing on the sales contract did not effect the independent options with their separate terms. As the trial judge correctly held, the options were supported by consideration (Finding 8, R. 100-101) and were valid in themselves even if the sale of parcel "B" had been rescinded.

The doctrine of merger generally only applied to prior agreements that differ from a final agreement that pertains to the same piece of property. The question usually revolves around merger of covenants and oral promises into the deed of conveyance. 77 Am Jur 2d, Vendor and Purchaser, §290 et. seq.; Kelsey v. Hansen, 18 Utah 2d 226, 419 P.2d 198 (1966), Knight v. Southern Pacific Co., 52 Utah 42, 17...

p.2d 689 (1918). Under that reasoning, in order to protect the easement for ingress and egress, which was the consideration for the options being given, that document had to be prepared at the closing on parcel "B" because it was on parcel "B" and would otherwise have been merged into the agreement represented by the deed to parcel "B".

Some covenants, however, because they are sufficiently independent of the agreement incorporated in a deed, are considered to be "collateral", and, therefore, not merged into the deed. 77 Am Jur 2d, Vendor and Purchaser, §291, p. 450, 38 ALR 2d 1310 at 1320, §6. But even these "collateral" agreements are concerning the one parcel of land in question.

Where there are three separate parcels in question, therefore, it seems clear a fortiori that there could be a merger by deed only as to the property being conveyed, which was parcel "B" at the closing on April 20, 1976.

A foreign case closely on point is McCraw v. Richardson, 459 P.2d 620 (Oklahoma 1969), in which a deed conveying one of two parcels previously contracted for but which erroneously excluded the other was held not to extinguish the buyer's claim to the excluded parcel.

In the case at bar, there was never a clearly expressed intent that the option rights should merge with the conveyance

of parcel "B". On the contrary, the earnest money agreement properly construed expressed the intent that the options survive the conveyance of parcel "B". Plaintiff, therefore, alleges that the option on parcel "A" was not abrogated or otherwise eliminated as a matter of law and urges that the trial court's decision be reversed because plaintiff is still entitled to specific performance under the option.

POINT THREE

PLAINTIFF IS ENTITLED TO SPECIFIC PERFORMANCE

In order for a party to be entitled to specific performance of an option, he must have complied with the option requirements in all respects. Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970); Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971); Nance v. Schoonover, 521 P.2d 896 (1974). Plaintiff gave notice to defendant that he wanted to exercise the option on parcel "A" and contends that notice was all that was required under the terms of the option. Tender of payment was not required under the option prior to the closing for parcel "A". Therefore, plaintiff complied with his duty under the option when notice of exercising the option was sent.

Plaintiff also contends that he is entitled to specific performance under the terms of the option because defendant never directly gave him notice that the prior option had expired. Plaintiff had to find out second hand from Walters. Defendant claims to have asked Gardner if plaintiff was exercising his option and that this was notice to plaintiff. Because Gardner was not the agent of plaintiff except for the purposes of negotiating or presenting offers as discussed in Point One, notice to Gardner was not binding on plaintiff. Specific performance then is a proper remedy for the plaintiff in this case.

CONCLUSION

Plaintiff alleges that the record herein and the legal principles applicable to the facts demonstrated by such record can reasonably and justly lead this honorable court to the following conclusions:

1. The authority given by plaintiff to the real estate agent was a "special" or "limited" power and did not include authority to waive the option.

2. A real estate agent does not have authority to waive an option agreement executed by its client without express written authority to do so.

3. The basis upon which apparent authority may be found, e.g. plaintiff knowingly permitting Gardner to waive the option or negligently failing to disapprove Gardner's acts is not present in this case; and hence, there can be findings of apparent authority.

4. There were three separate agreements embodied in the "Earnest Money" document designated as Exhibit D-6.

5. Each of the three agreements in Exhibit D-6 dealt with different parcels of real property.

These conclusions lead to the ultimate reversal of the decision of the trial court and a finding that plaintiff is entitled to specific performance.

Respectfully submitted,

JERIL B. WILSON
STOTT, YOUNG AND WILSON
84 East 100 South
Provo, UT 84601

CERTIFICATE OF MAILING

This is to certify that two true and exact copies of the foregoing Brief of Appellant were mailed to Jackson Howard, Attorney for Defendant-Respondent, 120 East 300 North, Provo, UT 84601, this 24 day of June, 1977.

Secretary